

05-629 NOV 15 2005

No. 05- OFFICE OF THE CLERK

IN THE  
**Supreme Court of the United States**

ARTHUR G. MUEGLER, JR.,

*Petitioner,*

v.

DAVID BENING and ALFRED W. HARRE,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

The Ninth Circuit affirmed the district court's and bankruptcy court's summary judgment in favor of creditors David Bening and Alfred Harre ("Creditors") on their bankruptcy adversary proceeding Complaint theory that Petitioner Muegler's ("Muegler") prior judgment debt to creditors was not dischargeable in bankruptcy under the 11 U.S.C. 523(a)(2)(A) "fraud" and the 11 U.S.C. § 523(a)(6) "willful and malicious injury" exceptions to debt discharge, and, that Muegler was collaterally estopped from contending otherwise. Creditor's based their summary judgment motion upon the prior case jury instructions and judgment. It was conceded Muegler received no direct or indirect "benefit" from the alleged "fraud". On appeal to the Ninth Circuit, Muegler contended (a) the "actual fraud exception" at 11 U.S.C. § 523(a)(2)(A) was not applicable because Muegler did not receive either a direct or indirect "benefit" from the alleged fraud and (b) the prior case jury instructions did not unambiguously find Muegler committed either "actual fraud" or "willful and malicious injury" within the meaning of the Bankruptcy Code, and, accordingly it was err to apply collateral estoppel due to the lack of identical issues in the Prior Case in juxtaposition with the case *sub judice*. The Ninth Circuit opinion held (a) no "benefit" finding is required under 11 U.S.C. § 523(a)(2)(A) and (b) Muegler waived the jury instruction issue.

Two questions are presented in this Petition For Writ of Certiorari, to wit:

1. Whether a debtor must receive a direct or indirect "benefit" from the fraud to qualify under the Bankruptcy Code "actual fraud" debt non-discharge exception at 11 U.S.C. § 523(a)(2)(A) ?

2. Whether a non-movant in a summary judgment proceeding may "waive" a summary judgment movant's initial burden under F.R.Civ.P. 56(c) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) to show the non-existence of a genuine issue of material fact and movant's entitlement to judgment as a matter of law?

**LIST OF ALL PARTIES BELOW**

The caption of the case in this Court contains the names of all parties to the proceedings of The United States Court of Appeals for the Ninth Circuit sought to be reviewed in this proceeding. No party is a corporation.

# TABLE OF CONTENTS

	<i>Page</i>
QUESTIONS PRESENTED .....	i
LIST OF ALL PARTIES BELOW .....	ii
TABLE OF CONTENTS .....	iv
TABLE OF CITED AUTHORITIES .....	v
TABLE OF APPENDICES .....	viii
OPINION BELOW .....	1
JURISDICTIONAL STATEMENT .....	1
STATUTORY AND RULES OF CIVIL PROCEDURE PROVISIONS INVOLVED ....	1
STATEMENT OF THE CASE .....	3
REASONS AND ARGUMENT FOR GRANTING THE PETITION .....	10
I. Reasons For Granting The Petition .....	10
II. Argument .....	13
A. A Direct or Indirect Benefit From The Fraud Must Be Obtained By Debtor ...	13
B. Ninth Circuit Opinion Violated F.R.Civ.P. 56 And Decisions Establishing Standards For Review Of a Motion For Summary Judgment .....	21
CONCLUSION .....	29

# TABLE OF CITED AUTHORITIES

	<i>Page</i>
<b>CASES</b>	
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986) .....	ii, 12, 21, 28, 29
<i>Archer v. Warner</i> , 538 U.S. 314 (2003) . . . .	10, 11, 13, 20, 28
<i>BancBoston Mortgage Corp. v. Ledford</i> , 970 F.2d 1556 (6th Cir. 1992) .....	11-12, 14, 19
<i>Bening v. Muegler</i> , 67 F.3d 691 (8th Cir. 1995) . . .	8, 10
<i>Cohen v. De La Cruz</i> , 523 U.S. 213 (1998) .....	<i>passim</i>
<i>Fields v. Mans</i> , 516 U.S. 59 (1995) .....	17
<i>Gleason v. Thaw</i> , 236 U.S. 558 (1915) .....	13
<i>Grogan v. Garner</i> , 498 U.S. 279 (1991) . . .	10, 11, 17, 20
<i>Harre v. Muegler</i> , 113 F.3d 909 (8th Cir. 1997) . . .	8
<i>In Re Apte</i> , 96 F.3d 1319 (9th Cir. 1996) .....	21
<i>In re Arm</i> , 87 F.3d 1046 (9th Cir. 1996) .....	12, 15
<i>In re Ashley</i> , 903 F.2d 599 (9th Cir. 1990) . .	12, 14, 15, 19
<i>In re Bilzerian</i> , 100 F.3d 886 (11th Cir. 1996) . . . .	<i>passim</i>
<i>In Re Cardelucci</i> , 285 F.3d 1231 (9th Cir. 2002) . . .....	21, 27, 28, 29
<i>In Re Eashai</i> , 87 F.3d 1082 (9th Cir. 1996) .....	21

## Cited Authorities

	<i>Page</i>
<i>In Re Hashemi</i> , 104 F.3d 1122 (9th Cir. 1996) . . . .	21
<i>In re M.M. Winkler</i> , 239 F.3d 746 (5th Cir. 2001) . .	19, 20
<i>In re Pleasants</i> , 219 F.3d 372 (4th Cir. 2000) . . . . .	
.....	12, 15, 16, 19, 20
<i>In re Pleasants</i> , 231 B.R. 893 (E.D. Va. 1999) . . . .	15
<i>In Re Su</i> , 290 F.3d 1140 (9th Cir. 2002) . . . . .	21, 28
<i>King General Contractors v. Reorganized Church</i> , 821 S.W.2d 821 (Mo. banc 1991) . . . . .	26
<i>Luce v. First Equipment Leasing Corp.</i> , 960 F.2d 1277 (5th Cir. 1992) . . . . .	12, 14, 19
<i>Matter of Holwerda</i> , 29 B.R. 486 (M.D. Fl. 1983) . . .	14
<i>Muegler v. Bening</i> , 413 F.3d 980 (9th Cir. 2005) . .	27
<i>Owens v. Government. Employers Insurance Co.</i> , 643 S.W.2d 308 (Mo. App. 1982) . . . . .	22, 26, 28

*Cited Authorities**Page***STATUTES AND RULES**

11 U.S.C. § 523 .....	9, 12
11 U.S.C. § 523(a)(2)(A) .....	<i>passim</i>
11 U.S.C. § 523(a)(6) .....	<i>passim</i>
28 U.S.C. § 158(a) .....	9
28 U.S.C. § 158(c)(1) .....	9
28 U.S.C. § 1254(1) .....	1
28 U.S.C. § 1291 .....	<i>passim</i>
F.R.Civ.P. 56 .....	9
Bankruptcy Rule 8001(e) .....	9



## TABLE OF APPENDICES

	<i>Page</i>
Appendix A — Opinion Of The United States Court Of Appeals For The Ninth Circuit Filed June 24, 2005 .....	1a
Appendix B — Order Of The United States District Court For The District Of Arizona Filed January 29, 2003 .....	12a
Appendix C — Order And Excerpted Transcript Of Proceedings Dated March 26, 2002 .....	28a
Appendix D — Order Of The United States District Court For The District Of Arizona Filed July 27, 2001 .....	43a
Appendix E — Judgment And Order On Plaintiff's Motion For Summary Judgment, Defendant's Separate Motions For Summary Judgment, And Plaintiff's Motion For Sanctions Of The United States Bankruptcy Court For The District Of Arizona Filed August 2, 2000 .....	57a
Appendix F — Order Of The United States Court Of Appeals For The Ninth Circuit Denying Petition For Rehearing Filed August 19, 2005 .....	60a

## OPINION BELOW

The United States Court of Appeals For The Ninth Circuit's ("Ninth Circuit") June 24, 2005 judgment and opinion sought to be reviewed by Writ of Certiorari is reported at 413 F.3d 980 (9th Cir. 2005). See Appendix A.

## JURISDICTIONAL STATEMENT

The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Ninth Circuit's opinion (Appendix A) was entered June 24, 2005. On July 11, 2005, the Ninth Circuit granted Petitioner leave of court and Petitioner timely filed Petitioner's Petition For Rehearing En Banc. Rehearing en banc and rehearing by the panel of judges who decided the case were denied August 19, 2005 (Appendix F). This petition was timely filed within ninety (90) days after denial of rehearing August 19, 2005.

## STATUTORY AND RULES OF CIVIL PROCEDURE PROVISIONS INVOLVED

This case involves important issues respecting the following provisions of the United States Code and the Federal Rules of Civil Procedure:

**Title 11 United States Code, Section 523**, to wit:

*"§ 523. Exceptions To Discharge.*

(a) A discharge under section 727, 11451, 1228(a), 1228(b) or 1328(b) of this title does not discharge an individual debtor from any debt –

(1) . . .

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by –

(A) false pretenses, a false representation,  
or actual fraud . . .

(B) ...

(C) ...

(3) ...

(4) ...

(5) ...

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity. . . .”

Federal Rules Of Civil Procedure 56 provides, in relevant part :

**“Rule 56. Summary Judgment**

...

(c) Motion And Proceeding Thereon. . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . .

...

(e) Form of Affidavits; Further Testimony; Defense Required. . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party’s pleading, but the adverse party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party. . . .”

## STATEMENT OF THE CASE

Concepts Communication Management Corp. ("Concepts"), a Missouri corporation, was organized August 6, 1987 (R:278). Concepts engaged in the paging, telephone answering and cellular telephone business in the Metro St. Louis, Missouri, Area (R:278). Concepts initial funding came from investors in the form of investment in limited partnership interests in Concepts Tele Communications L.P.I and L.P.II ("Partnership") (R:278). Creditors David Bening and Alfred Harre ("Creditors"), in April-May 1988, invested in Partnership (R:278). In late July, 1988, Petitioner Arthur G. Muegler, Jr. ("Muegler"), a Missouri lawyer, was retained by Concepts to restructure the Concepts group of companies to correct an organizational deficiency created by a previous Concepts lawyer (R:278). At the time, Concepts investors held a limited partnership interest in a non-operating shell having no assets (Sic: Partnership) while the assets and operations of the Concepts companies were conducted within the Concepts corporate structure (R:278). Therefore, unless restructured, the "investors" had no equity interest in the organization actually conducting Concepts' business . . . because, before restructuring, the money the investors previously "invested" was being used by an organization (i.e. Concepts Communicatio.. Management Corp.) the investors had no equity interest in whatsoever (R:278). Muegler was retained to restructure Concepts to correct this deficiency so that prior Concepts investors would have an equity interest in Concepts as originally contemplated (R:278).

Muegler's Concepts reorganization plan, which was adopted and implemented by Concepts in a Prospectus Private Offering (exempt from federal and Missouri security registration laws) ("Prospectus") (R:288), had the following features: (a) Concepts made a stock offering to existing Partnership investors whereby the investor assigned his Partnership interest to Concepts in return for Concepts stock, (b) the offered Concepts stock maintained the proportionate equity status of each investor as contemplated at the time of the original